Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 26 of the Cable	)	
Television Consumer Protection and Competition	)	PP Docket No. 93-21
Act of 1992	)	
	)	
Inquiry into Sports Programming Migration	)	

COMMENTS

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

Paul J. Sinderbrand
Dawn G. Alexander
Sinderbrand & Alexander
888 Sixteenth Street, N.W.
Suite 610
Washington, D.C. 20006-4103
(202) 835-8292

Its Attorneys

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EXECUTIVE SUMMARY

The growth of non-broadcasting sports networks and pay-per-view has brought a wider array of sports programming to the American public than had ever been available before. However, because that programming is generally only available from a *de facto* monopolist, consumers have paid more for access to that programming than they should have.

For many consumers, it is the availability of additional sports programming that drives the decision to subscribe to a multichannel video programming service. Thus, access to sports programming is essential for any multichannel video programming

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I. INTRODUCTION AND STATEMENT OF INTEREST.

As the trade association of the wireless cable industry, WCA is vitally interested in the outcome of this proceeding. Among WCA's members are the operators of virtually every wireless cable system operating today in America.[4/] Congress and the Commission have frequently acknowledged that wireless cable represents one of the most promising sources of competition in the local multichannel video programming marketplace.[5/] Yet, both Congress and the Commission have recognized time and again that fair access to programming is essential for competition from wireless cable

that the public interest is ill-served when consumers are deprived of alternative sources of non-broadcast sports programming.[7/]

WCA believes that non-broadcast sports networks and pay-per-view services can substantially advance the public interest, as they have made far more sports programming available to consumers than were available before. However, there can be no doubt that consumers have paid an unnecessarily high price for that

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[6/] (...continued)
Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962, 5031 (1990) ["[r]easonable access to programming is important for achieving effective competition among program distributors and fostering maximum possible public choice."]; Statement of Hon. Alfred C. Sikes on FCC Cable Television Policies, Recommendations, and Initiatives Before the Subcommittee on Communications, Committee on Commerce

programming. Indeed, with passage of the 1992 Cable Act, Congress acknowledged that cable continues to exercise undue market power as a result of its *de facto* monopoly in virtually every community. Section 2(a)(2) of the 1992 Cable Act specifically provides that:

> most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as

"independent" could be cowed by the economic monopsonistic power wielded by the cable monopoly.

As Congress discovered, cable systems have a documented history of

[redacted] obtain equity in programmers in exchange for express or implied [redacted]

threats against programmers who proposed to distribute through alternative technologies[13/] or compete with vertically integrated programmers.[14/]

Given cable's history of quashing competitive threats to its local monopoly, the evidence placed before Congress of cable's reaction to the potential of wireless cable should have been predictable. In hearings and informal meetings, Congress became well aware that:

> The wired cable companies are dealing with the wireless threat with closed fists. Their ultimate weapon: control over programming, without which the wireless systems will surely wither.[15/]

As one wireless system operator observed:

> cable system operators are using black-mail to stop program suppliers from selling to [wireless cable]. . . . Several [program suppliers] flatly stated they wouldn't do business with [wireless cable] because the cable-TV industry would drop them if they dealt with anybody but cable.[16/]

[13/] In 1985, for example, TBS, Showtime (neither of which were then owned by TCI) and ESPN ran afoul of TCI when they attempted to compete with TCI by assembling a package of services for distribution to home satellite dish owners. Those plans were dropped when TCI (the largest customer for the TBS, Showtime and ESPN programming services), reportedly expressed its displeasure to the three programmers. Not insignificantly, soon thereafter TCI began to market its own package of programming to home dish owners -- a package which included ESPN, Showtime and TBS's CNN. *See* Cable's Biggest Leaguer, *supra* note 10, at 40.

[14/] For example, the cable MSOs that own TBS refused to carry CNBC until they received a commitment that CNBC would not carry programming competitive with CNN. *See* The New World of TV, *supra* note 9, at 584.

[15/] Meeks, "The Wireless Wonder," *Forbes*, at 60 (Feb. 19, 1990).

[16/] Block, "A Cable Cartel?," *Forbes*, at 82 (Feb. 10, 1986).

Little wonder, then, that Congress determined that:

> vertically integrated cable programmers have the incentive and ability to favor cable operators over other video distribution technologies through more favorable prices and terms. Alternatively, these cable programmers may simply refuse to sell to potential competitors.[17/]

It was because of cable's market power over programmers, and cable's willingness to use that power, that Congress passed Sections 12 and 19 to protect programmers and potential competitors alike. Unfortunately, WCA must report that, despite the passage of the 1992 Cable Act almost six months ago, wireless cable systems are still being denied access to critical sports programming. The result is that consumers desirous of viewing non-broadcast sports programming continue to have only one source -- the local cable monopoly

II. ACCESS TO SPORTS PROGRAMMING IS ESSENTIAL FOR A MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTOR TO EFFECTIVELY COMPETE AGAINST CABLE.

Access to sports programming, more than any other category of programming, is of critical importance to the success of emerging competitors to cable. Wireless cable system operators intend that, like their cable brethren, they will be major

marketplace than Tele-Communications, Inc. ("TCI") has represented to the Commission that sports programming carried by ESPN and the regional sports services, among others, "is so intrinsically valuable to a community" that a cable operator must carry it at any cost."[18/] Clearly, a wireless cable system cannot successfully compete against a franchised cable system without a full lineup of the sports programming local consumers demand.

III. CRITICAL SPORTS PROGRAMMING REMAINS UNAVAILABLE TO WIRELESS CABLE SYSTEM OPERATORS.

As Congress was well-aware when it passed Section 26, there is not a single wireless cable system operating today that is not being denied access to at least some of the popular sports programming that consumers demand.[19/] The cable industry

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[18/] Statement of Robert Thompson, Vice President, Government Affairs, Tele-Communications, Inc., before the FCC, Los Angeles Field Hearing, MM Docket No. 89-600, at 4-5 (Feb. 12, 1990).

[19/] *See* Testimony of James M. Theroux, WCA Regulatory Affairs Chairman, Before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Monopolies and Business Rights (March 17, 1988); Testimony of Mark Foster, Chairman, The Microband Companies Inc. Before The United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Monopolies and Business Rights (March 17, 1988); Testimony of Robert L. Schmidt, WCA President, before the House Subcommittee on Telecommunications and Finance (June 15, 1988); Testimony of Robert L. Schmidt, WCA President, before the House Subcommittee on Economic and Commercial Law (March 14, 1989); Testimony of Robert L. Schmidt, WCA President, before the Senate Subcommittee on Communications (June 21, 1989); Testimony of Joseph W. Hipple III, PCTV Partners, before the House Subcommittee on Telecommunications and Finance (April 19, 1992); Testimony of Robert L. Schmidt, WCA President, before the Senate Subcommittee on Communications (March 14, 1991).

knows full well that competitors to cable cannot succeed without access to the most popular sports programming. Given cable's long track record of crushing competition, it should come as no surprise that cable systems have employed the leverage over programmers they derive from their local monopolies to restrict access to sports programming by competitive technologies.

In passing Section 26 of the 1992 Cable Act, Congress expressly indicated its concern that sporting events are not being made available to competing technologies.[20/] Congress' concern over the availability of sports programming remains valid today, almost a half year after the 1992 Cable Act was enacted into law. Although Sections 12 and 19 of the 1992 Cable Act were intended to provide all multichannel video programming distributors fair access to programming,[21/] WCA has seen no meaningful change in the marketplace. Just as was the case when the Commission first reported

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[20/] House Report, *supra* note 5, at 127.

[21/] The Conference Report that accompanied the 1992 Cable Act stated that:

to Congress on program availability in 1990, sports programming remains the most elusive category for wireless cable operators.[22/]

Turner Network Television ("TNT"), which carries National Basketball Association ("NBA") games that are among the most popular cable programs during the winter and spring and exclusive National Football League ("NFL") games Sunday evenings during one-half of the football season, continues to refuse to deal with wireless cable operators. Significantly, TNT's NBA carriage was transferred by parent

serve areas not covered by exclusive contracts, and even refuses to permit wireless cable operators to provide TNT in non-cabled areas.[25/] Thus, even assuming for purposes of argument that there may be public interest benefits in exclusive programming agreements, these benefits are not even arguably present here.

special sporting events, TBS's cross-marketing makes wireless subscribers painfully aware that they are "second class citizens" when it comes to sports programming.

TNT is hardly the only holdout. Regional sports networks continue to be among the most difficult programming services for wireless cable operators to carry. Several of the regional sports networks in which TCI has an equity interest will only deal with wireless cable operators who agree to black out the sports programming in homes within TCI franchise areas. While Prime Ticket Network, the major regional sports network in Southern California, has not expressly refused to deal with wireless cable, it has engaged in a series of stalling tactics with wireless systems throughout California. As best WCA can determine, Prime Ticket Network does not serve any wireless system in California. Other regional sports services demand rates for carriage that are so high, or impose such other onerous conditions on carriage, as to be tantamount to refusals to deal.

Even distributors of broadcast superstations present a problem. In MM Docket No. 92-265, People's Choice TV of Tucson, Inc. ("PCTV") has extensively documented its ongoing battle with Netlink USA ("Netlink").[26/] PCTV owns and operates the wireless cable system serving over 11,000 subscribers in and around Tucson, AZ. Tucson is the spring training home of one of Major League Baseball's

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[26/] *See* Reply Comments of People's Choice TV Partners, MM Docket No. 92-265 (filed Feb. 13, 1993); Letter from Paul J. Sinderbrand to Chairman James H. Quello, MM Docket No. 92-265 (dated Mar. 24, 1993).

two new teams, the Colorado Rockies. The Tucson community has quickly embraced the Rockies as its own "home team." Many of the pre-season and regular season games of the Rockies will be broadcast over KWGN (Denver, CO), and PCTV would like to retransmit those games in Tucson. Representatives of PCTV have met with the Rockies' owners and had numerous discussions with KWGN, all of whom are quite enthusiastic about PCTV's plan to strengthen the ties between Tucson and the Rockies by retransmitting in Tucson KWGN's coverage of Rockies' games.

The problem is that Netlink, which is owned by TCI and is the only company uplinking the KWGN signal, continues to deny PCTV access to the signal. No cable system with which PCTV competes, not even the system in which TCI has an ownership interest, has an exclusive agreement with Netlink. Indeed, no cable system in the Tucson area is carrying KWGN. The Netlink representative first contacted by PCTV to secure carriage of KWGN stated that Netlink's policy is to refuse to deal with wireless cable. While representatives of Netlink have since attempted to back away from that statement, the fact remains that Netlink still refuses to provide PCTV with access to KWGN. With Opening Day just a week away, it appears that Rockies fans in Tucson will be deprived by Netlink of an opportunity to view their adopted home team in action.

IV. CONCLUSION.

Because the Commission is still considering rules to implement Sections 12 and 19 of the 1992 Cable Act,[27] it is too early for WCA to determine whether those provisions will provide meaningful relief to wireless cable operators who are unable to secure fair access to sports programming. Many of the programming networks that refuse to deal with wireless cable now claim that they are awaiting the resolution of MM Docket No. 92-265. Whether they are being truthful, or merely engaging in another stalling tactic, remains to be seen. Certainly, if the Commission adopts the interpretations of Sections 12 and 19 advanced by the cable industry in MM Docket No. 92-265, the issue will be moot: the 1992 Cable Act will provide the wireless cable industry with only minimal additional access to programming.[28]

Because the Commission's implementation of Sections 12 and 19, and the programmers' response, are so central to this proceeding, WCA urges the Commission to keep the record open as long as possible after the release of the initial *Report and Order* in MM Docket No. 92-265 for the submission of additional comments addressing the availability of sports programming to alternative technologies. If Sections 12 and 19 do not provide the relief that Congress intended, the Commission's

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[27] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992,* MM Docket No. 92-265, FCC 92-543 (rel. Dec. 24, 1992).

[28] *See* Reply Comments of Wireless Cable Ass'n Int'l, MM Docket No. 92-265 (filed Feb. 16, 1993).

July 1, 1993 interim report and its July 1, 1994 final report to Congress on the distribution of sports programming should recommend specific legislative relief. Otherwise, discriminatory access to sports programming will forever prevent the dream of providing consumers alternative sources of multichannel video programming from becoming a reality.

Respectfully submitted,

WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

By: 
Paul J. Sinderbrand
Dawn G. Alexander

Sinderbrand & Alexander
888 Sixteenth Street, N.W.
Suite 610
Washington, D.C. 20006-4103
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